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Supreme Court, U.S.
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No. 86—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERIC A. GRIFFIN,

Petitioner,

v.

GREGORY HILKE AND
FRANCIS STOLL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES E. HULLVERSON, JR.
Counsel of Record
GRETCHEN GODAR-MYERS
HULLVERSON, HULLVERSON
& FRANK
1010 Market, Suite 1550
St. Louis, Missouri 63101
(314) 421-2313
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTIONS PRESENTED

1. An important question under 42 U.S.C. § 1983 and the 4th Amendment which has not been, but should be settled by this Court: whether negligent misconduct by one police officer, acting in concert to arrest a suspect, is actionable under Section 1983 when such misconduct contributes to cause a second officer to shoot an unarmed suspect resulting in an unreasonable deadly force arrest in violation of the Fourth Amendment to the United States Constitution?

2. Whether a police officer who shot a fleeing suspect is entitled to assert a qualified immunity defense under a Missouri fleeing felon arrest statute, when the arrest occurred after the Eighth Circuit had declared that statute unconstitutional, and when the Missouri statute conflicted with the police officers' own department rules and regulations (state regulations) which established the same deadly force guidelines as those later declared constitutional in *Tennessee* v. *Garner*, 105 S.Ct. 1694 (1985)?

3. Whether the Eighth Circuit Court of Appeals properly followed Federal Rule of Evidence 103 in overruling the trial court and finding reversible error during final argument of counsel?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Eric A. Griffin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 6, 1986, and denial of rehearing on January 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 804 F.2d 1052, and is reprinted in the appendix hereto, p. A-1a, infra.

The memorandum decision of the United States District Court for the Eastern District of Missouri has not

been reported. It is reprinted in the appendix hereto, p. B-12a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner's suit was removed from state court to the Federal District Court, Eastern District of Missouri. On January 3, 1986, after a verdict and judgment were entered for the petitioner, the Eastern District denied respondents' motion for judgment notwithstanding the verdict and for new trial. See p. B-12a, infra.

On respondents' appeal, the Eighth Circuit on November 6, 1986, entered a judgment and an opinion reversing and remanding the Eastern District's judgment as to Hilke and directing that petitioner's action as to Stoll be dismissed for failure to present evidence that Stoll was more than negligent under § 1983. See p. A-1a & C-18a, infra. Petition for rehearing or rehearing en banc was denied on January 22, 1987. See p. C-20a, infra.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983. Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On the night of February 18, 1978, Police Officer Hilke shot Eric Griffin from behind while Eric was unarmed and was climbing over a chain link fence. Tr. 11/8:79, 88-91. Eric was fleeing from police after fighting with three white adults, who had just purchased a six pack of beer for him. Officer Stoll was the first police officer to observe the fight, and he began to chase Eric across snow packed yards. Officer Hilke, the one who shot and wounded Eric, never saw the underlying events; he joined the pursuit and shot Eric based on police broadcasts. As a result of the shooting, Eric Griffin's leg was amputated below the knee, he has attempted suicide and has been hospitalized numerous times at the State Mental Hospital. Tr. 11/5:49; 11/6:13. Eric was 17 years old the night Hilke shot him.

In July of 1978, Griffin filed suit in Missouri State Court against Hilke alleging tortious battery. In amended pleadings, Griffin joined Officer Stoll as a defendant and claimed civil rights violations under 42 U.S.C. § 1983, and a state tort theory against the two police officers. The police removed the case to the Federal District Court. On November 14, 1984, following a six day trial on the § 1983 action, the jury returned a verdict against both Hilke and Stoll for $750,000.00, and the Court entered judgment accordingly. p. B-11a, infra. The district court denied motions for judgment n.o.v. and for new trial. p. B-12a, infra.

On appeal, the Eighth Circuit dismissed Griffin's claim against Stoll holding that more than mere negligence was required under a Fourth Amendment, § 1983 action. The

court reversed and remanded as to Hilke based upon error in final argument. The court did not rule on Hilke and Stoll's claim of entitlement to a qualified immunity defense as a matter of law.

The following are the relevant facts in this case:

On February 18, 1978, as St. Louis Police Officer Stoll was responding to a call for shots fired, he noticed three white adults and one black juvenile fighting at a liquor store a block away from where the shots were reported. As Stoll arrived, Eric Griffin, the juvenile, began to walk away. Stoll called out "come back here nigger" at which point Griffin, out of fear, began to move quickly. Tr. 11/6:92-94. Within 10 to 15 seconds of Stoll's arrival and before Stoll talked to the others, Stoll pulled out his gun and fired a shot.[1] Tr. 11/6:95. Eric ran and a chase ensued.

The other men denied they told Stoll that Eric had robbed them.[2] Tr. 11/6:45; 11/7:100, 102, 118. However, Stoll broadcast that he was chasing a suspect wanted for possible assault and robbery. Tr. 11/8:93. Although there is a disputed "is armed" statement[3] on the tape recording of the broadcast during the chase, all the police concede that Eric neither had nor displayed any kind of weapon, and the police failed to produce any witnesses to the contrary. Tr. 11/6:45; 11/7:103, 121; 11/8:54.

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[1] Even if this was a warning shot, as Stoll contends, it was in violation of the police department rules and regulations in force at the time. Tr. 11/8:127.

[2] The facts directly contradict any implication that Eric was attempting to rob anyone. All agreed that Eric was attempting to get his change back from the money he had given the men to buy beer.

[3] This statement was not found on the original transcript supplied by the police, nor was it heard by Griffin's investigator when he listened to the tape prior to trial and no one admits making it.

Officer Hilke was patrolling the vicinity when he heard these broadcasts. He parked, took out his gun and set out on foot after Eric. He spotted Eric and chased him across snow packed yards and fences for a short while before he shot him.

Griffin's expert, Dr. George Kirkham, testified that Officers Stoll and Hilke fell far below the accepted national standards relative to police conduct in this situation. Tr. 11/7:25. It was also his opinion that the conduct of Stoll and Hilke was grossly excessive under the circumstances and totally inappropriate. Tr. 11/7:32. Stoll's and Hilke's own expert faulted the two officers for firing warning shots. Tr. 11/8:130.

Central to the ultimate issue submitted to the jury, was the fact that the St. Louis Board of Police Commissioners adopted the following state regulation in December of 1976 for the use of deadly force:

> Deadly force may be used to apprehend a fleeing felon only if one of the following circumstances is present:
>
> The officer reasonably believes that the suspect had used or threatened to use deadly force in the commission of a felony, or
>
> The officer reasonably believes that the suspect would use deadly force against the officer or others if not immediately apprehended.
>
> Firing shots in the direction of a vehicle is considered to be deadly force, so shots should not be fired at a vehicle unless one of the elements mentioned above is present.

This state regulation formed the basis for the jury verdict directing instructions. See p. D-21a, infra. The jury

returned a verdict against both Stoll and Hilke for $750,000.00.

REASONS FOR GRANTING THE WRIT

I. The Decision Below That Negligent Misconduct By One Police Officer, Acting In Concert To Arrest A Suspect, Is Not Actionable Under § 1983 When Such Misconduct Contributes To Cause A Second Officer To Shoot An Unarmed Suspect Resulting In An Unreasonable Deadly Force Arrest In Violation Of The Fourth Amendment To The United States Constitution Raises Important Unresolved Problems.

A. This Court In *Daniels* v. *Williams*, 106 S.Ct. 662 (1986) Specifically Reserves This Issue For Consideration By This Court.

The Eighth Circuit holds that to recover against Stoll[4] under § 1983 for a *due process violation*, Griffin must plead and prove that Stoll was more than negligent. See p. A-4a, infra. The Eighth Circuit based this holding on *Daniels* v. *Williams*, 106 S.Ct. 662 (1986). However, the Court failed to make the distinction that the claim against Stoll was for contributing to cause a deprivation of Griffin's *Fourth Amendment Rights* to be secure from unreasonable force, rather than a claim for violation of his procedural due process rights. In *Daniels* v. *Williams*, Justice Renquist carefully stated:

> In *Parratt* v. *Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 552. After examining the language, legislative history and prior interpretations of the stat-

[4] Stoll is the police officer who initially started the chase after Griffin, fired the warning shot and broadcast that Eric was wanted for possible assault and robbery.

> ute, we concluded that § 1983, unlike its criminal counter-part 18 U.S.C. § 242 contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.* at 534-535. *We adhere to that conclusion.* But in any given § 1983 suit, the plaintiff still must prove a violation of the underlying constitutional right; and *depending on the right, merely negligent* conduct may not be enough to state a claim.

106 S.Ct. 662, 664 (1986) (emphasis added). He reinforced this reservation by stating:

> But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the due process clause of the Fourteenth Amendment.

Id. at 666.

The Eighth Circuit failed to make an important distinction between the three different kinds of constitutional protections afforded under the due process clause, as noted by Justice Stevens in his concurring opinion in *Daniels*. Justice Stevens very aptly pointed out that "the type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief." *Daniels*, 106 S.Ct. at 677-78. This Court also noted in *Baker* v. *McCollan*, 443 U.S.137 (1979), that the question whether an allegation of negligence is sufficient to state a cause of action under § 1983 "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." *Id.* at 140.

The petitioner's claims in *Daniels* and *Davidson* v. *Cannon*, 106 S.Ct. 668 (1986) were distinctly different than

that of the petitioner in this case. Neither *Daniels* nor *Davidson* argued that the prison authority's actions violated specific constitutional guarantees incorporated by the Fourteenth Amendment.[5] However, Griffin specifically argues that Stoll violated his Fourth Amendment rights to be secure from unreasonable force.[6]

Since § 1983 does not itself contain any intent requirement, the relevant inquiry should perhaps focus on what state of mind, if any, is imposed by the particular constitutional provision at issue. See generally, S. Nahmod. *Civil Rights and Civil Liberties Litigation*, § 3.01-02 (1979); Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 Cin. L. Rev. 45 (1977); Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. Pa. L. Rev. 533 (1978). Of all of the bill of rights, the Fourth Amendment right to be secure from unreasonable search and seizure explicitly creates a right against negligent misconduct. It is the right to be free from unreasonable search and seizure. Consequently, stated in the positive form, the duty is to conduct *reasonable* searches and seizures. The "reasonableness standard" is a concept pregnant with the standard of negligence. Griffin plead, proved and the jury found that Stoll's misconduct violated this reasonableness standard.

Justice Renquist acknowledged that the petitioner's negligence claim in *Davidson* was quite different from claims involving injuries caused by an unjustified attack by prison guards themselves or by another prisoner

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[5] *Daniels* and *Davidson* fall into Justice Steven's third category involving violations of procedural due process.

[6] Griffin's claim is under Justice Steven's first category: where a specific constitutional guarantee is at issue.

where officials simply stood by and permitted the attack to proceed.[7] *Id.* at 670-71. This implies that in the latter instances a claim based upon negligence may state a § 1983 cause of action. The case at bar is similar, in that Stoll, while not commiting the ultimate act which caused Griffin's injuries, negligently broadcast and fired warning shots which contributed to cause those injuries.

This Court with great aptitude and forethought reserved the possibility that there are other constitutional provisions that would be violated by mere lack of care. *Daniels*, 106 S.Ct. at 666. The Eighth Circuit failed to recognize the precision with which *Daniels* was written, and used *Daniels* as blanket abnegation of all § 1983 claims based upon negligent misconduct. It is imperative that this Court finally address this issue squarely and provide guidance to the lower courts as to the availability of negligent misconduct based claims in § 1983 actions.

B. The Eighth Circuit Decision Is In Conflict With Decisions Of The Other Circuit Courts Of Appeals Which Hold That Negligent Misconduct Is Actionable Under § 1983.

The Eighth Circuit reversed and dismissed Griffin's cause of action with regard to Stoll based upon: 1) Griffin was required to plead and prove that Stoll was more than negligent, citing *Daniels* v. *Williams*, 106 S.Ct. 662 (1986); and 2) Stoll's conduct in transmitting an erroneous broadcast did not rise to the level of a substantive constitutional violation, because he never used force against Griffin or otherwise committed an unreasonable seizure.

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[7] Also, Justice Blackman and Marshall in their dissenting opinion in *Davidson* distinguished *Daniels* from Davidson and indicated that some negligent conduct would implicate the constitution's guarantee of due process. *Id.* at 671.

See p. A-5a, infra. This holding is in direct conflict with decisions of other circuit courts of appeals and is not mandated by this Court's decisions in *Daniels* or *Davidson*. See I.A., supra.

Several circuits have held that negligence is sufficient to state a cause of action in § 1983, Fourth Amendment claims. See, e.g., *Ware* v. *Reed*, 709 F.2d 345 (5th Cir. 1983); *Smith* v. *Heath*, 619 F.2d 220 (6th Cir. 1982); *Byrd* v. *Brishke*, 466 F.2d 6 (7th Cir. 1972). The court in *Smith* stated that although the police officer "did not personally commit all of the acts depriving appellees of their rights, he is nonetheless liable for the deprivation he caused." *Smith*, 691 F.2d at 224. The court believed this view was mandated by the language in § 1983 which makes every person who *causes* any citizen to be subject to the deprivation of any rights secured by the Constitution liable.

The court in *Ware* found that the district court erred in not giving an instruction on the defendant's alleged acquiescense in the unconstitutional conduct of other officers. *Ware*, 709 F.2d at 353. The court in citing *Huey* v. *Barloga*, 277 F.Supp. 864, 872 (N.D. Ill. 1967), acknowledged that "where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his omission." *Id.* at 353.

In *Byrd* v. *Brishke*, the court adopted plaintiff's position that even if the police officers did not personally participate in the violation of plaintiff's civil rights, they were liable for negligently or intentionally failing to protect the plaintiff from others who did violate his rights. *Id.* at 10-11.

The courts in *Haygood* v. *Younger*, 718 F.2d 1472 (9th Cir. 1983), *Fernandez* v. *Chardon*, 681 F.2d 42 (1st Cir.

1982), and *Hirst* v. *Gertzen*, 676 F.2d 1252 (9th Cir. 1982), all concluded that an action for deprivation of civil rights can rest on negligent conduct. While these decisions and those stated above are all pre-*Daniels* and *Davidson* opinions, they still have precedential value in that they rest in Justice Steven's first category involving a specific constitutional guarantee.[8] Additionally, Justice Blackman and Marshall in their dissent in *Davidson* v. *Cannon*, joined in pertinent part by Justice Brennan, recognized that "in some cases, by any reasonable standard, governmental negligence is an abuse of power." *Davidson*, 106 S.Ct. at 673.

The Eighth Circuit found that Stoll's conduct in transmitting an erroneous broadcast did not rise to the level of a substantive constitutional violation because Stoll never used force against Griffin or otherwise committed an unreasonable seizure. In sharp contrast, Judge Cahill in the district court's opinion ably notes that while liability under § 1983 must be predicated on some personal involvement, the requisite causal connection can be established by showing that the tort feasor sets in motion a series of acts by others which the actor knows or reasonably should have known would cause others to inflict the constitutional injury. See B-15a, infra; *Johnson* v. *Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

Other circuits are in complete accord with Judge Cahill's district court opinion. This Court in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), agreed that "[§ 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." See also, *Byrd* v. *Brishke*, 466 F.2d 6, 10 (7th Cir. 1972). To hold a police officer liable

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[8] See p. 7-8, supra.

under § 1983, it is not necessary to demonstrate that the officer actively participated in striking a plaintiff. *Bruner* v. *Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982).

It is interesting that the Eighth Circuit in *Putman* v. *Gerloff*, 639 F.2d 415 (8th Cir. 1981), concluded that a police officer could be held jointly liable for failing to intervene if a fellow officer was using excessive force and otherwise was unlawfully punishing a prisoner. The court, in that case, insightfully pointed out that to hold otherwise would be to insulate non-supervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace. *Putman*, 639 F.2d at 423. It is difficult to understand how the Eighth Circuit can in Putnam hold an officer jointly liable for failing to intervene in the use of excessive force, but in *Griffin* holds that there is no cause of action stated against a fellow officer who actually participates in and initiates a chase, and is the cause or contributing cause to the unreasonable deadly force arrest.

Clearly, the Eighth Circuit is in direct conflict with other circuit courts and with the tenor of this Court's decisions in *Daniels* and *Davidson*. Under the circumstances in *Griffin*, negligent misconduct should be actionable under § 1983.

C. This Issue Presents Substantial Policy Considerations With National Implications.

Griffin's Fourth Amendment rights were violated by the excessive and unreasonable force used by Hilke in his chase and apprehension of Griffin. Judge Cahill in his opinion concluded that the jury could have quite properly found that defendant Stoll's firing of the warning shot and his radio broadcast set in motion those acts which culmi-

nated with plaintiff's shooting by Hilke. See p. A-15a, infra. Therefore, the trial court concluded that Stoll's misconduct contributed to cause Hilke to shoot an unarmed suspect resulting in an unreasonable deadly force arrest in violation of the Fourth Amendment to the United States Constitution.

Under these circumstances, if no cause of action under § 1983 is stated against Stoll, then a catch-22 situation is created by the court. The police officer who directed or inspired the shooting will avoid liability by claiming he was only negligent. The shooting officer will claim that the shooting to arrest was reasonable because he was relying on the carelessly exaggerated claims and directions of a fellow officer. Consequently, the wrongdoing and injury will go unremedied, despite a valid claim of unreasonable arrest.

In this scheme of law, negligence would become an affirmative defense for *every* police officer wishing to defeat § 1983 shooting arrest claims. All the police would need to do is carelessly exaggerate the suspected crime to cover their colleagues' shootings. The shooter would be effectively immunized by the exaggeration, and the exaggeration will immunize the broadcaster because it was only negligent.

Clearly, this is not the congressional intent behind § 1983, nor is it the intended effect of this Court's decision in *Daniels* v. *Williams*. Ruling out all negligent misconduct as a basis for § 1983 claims would create a world of chaotic and unwarranted shootings by police officers of innocent, unarmed victims. Such a holding is far reaching with great and alarming national implications.

II. A Police Officer Who Shot A Fleeing Suspect Should Not Be Entitled To Assert A Qualified Immunity Defense Under A Missouri Fleeing Felon Arrest Statute, When The Arrest Occurred After The Eighth Circuit Had Declared That Statute Unconstitutional, And When The Missouri Statute Conflicted With The Police Officers' Own Department Rules And Regulations Which Established The Same Deadly Force Arrest Guidelines As Those Later Declared Constitutional In *Tennessee* v. *Garner*, 105 S.Ct. 1694 (1985).

A. The Police Officers' Department Rules And Regulations (State Regulations) Setting Forth Deadly Force Guidelines Were Clearly Established Constitutional Rights Of Which A Reasonable Person Would Have Known.

The issue of qualified immunity was raised on appeal;[9] however, the Eighth Circuit chose not to address Stoll's and Hilke's arguments concerning the defense of qualified immunity because "the question was not necessary to its decision." This case was remanded as to Hilke, and Hilke has now, the second time around, plead the qualified immunity defense. Therefore, it is a question which should have been addressed by the Eighth Circuit, since no remand would be necessary if the qualified immunity defense is available to Hilke. As it now stands, Griffin may be required to go through another trial on the merits, only to find on the second appeal that Hilke was protected by a qualified immunity defense. See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Kennedy* v. *City of Cleveland*, 797 F.2d 297 (6th Cir. 1986).

This Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) held that government officials are shielded from liability

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[9] Stoll did not plead the qualified immunity defense and Hilke did so very late and without leave of Court. Neither defendant offered an instruction on the affirmative defense.

for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. However, if the law was clearly established and violated by the official, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct. "This is not to be considered a license to lawless conduct." *Id.* at 819-820.

Harlow may have eliminated the qualified immunity defense in excessive force cases. See *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427, 2430 n. 1 (1985). The Eleventh Circuit recognized that a qualified immunity instruction is inappropriate in an excessive force case since "it is clearly established that a police officer may not apply undue force in effecting an arrest." *Clark* v. *Beville*, 730 F.2d 739, 740 (11th Cir. 1984); see also *Fernandez* v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986); *Coon* v. *Ledbetter*, 780 F.2d 1158 (5th Cir. 1986). Clearly, by the time the deadly force arrest had occurred in *Griffin* the limits in effecting that arrest had been clearly established by the Eighth Circuit and by the police department regulations. Therefore, no qualified immunity defense should be available to Stoll and Hilke.

The defendants as police officers were agents of the State of Missouri, and bound by the state policies (as defendants concede) established by the police department directives.[10] However, both Stoll and Hilke neglected to learn the police department rules and regulations regarding the limits placed on the use of deadly

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[10] There is no dispute between the parties that the police department directives were state regulations, since they were promulgated by the Board of Police Commissioners, a state agency. See R.S.Mo. § 84.090 (1987).

force. Tr. 11/6:118, 132. In addition, at trial Hilke admitted that during the arrest he had no indication that deadly force had been used in any crime:

> QUESTION: You, yourself, mention that a person whose money is taken by force can be a robbery?
>
> ANSWER: Yes, sir.
>
> QUESTION: And that does not include deadly force?
>
> ANSWER: That's correct.
>
> QUESTION: You had no indication that deadly force had been used in any crime?
>
> ANSWER: As per se as the description, no. Or as it was broadcast, no it didn't indicate deadly force . . .

Tr. 11/8:94.

The police department directives were issued in December, 1976, and reiterated in January, 1977. These rules were issued in direct response to the Eighth Circuit's pronouncement in *Mattis* v. *Schnarr*, 547 F.2d 1007, 1009 (8th Cir. 1976), that the Missouri fleeing felon statute was unconstitutional. The police directive adopted the criteria established in *Mattis* for deadly force arrests, and those later declared constitutional in *Tennessee* v. *Garner*, 105 S.Ct. 1694 (1985). See p. 5, supra. Consequently, by February, 1978,[11] Griffin had clearly established constitutional right to be free from harm caused by violation of those directives by St. Louis police officers. Griffin's Fourth Amendment right to be free from unreasonable search and seizure reciprocates with the police duty to withhold deadly force under the department regulations.

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[11] When Eric Griffin was shot.

Davis v. *Scherer*, 464 U.S. 1017 (1984) is distinguishable on the facts. In *Davis* the state "violated no clearly established due process right when it discharged a civil service employee without any predetermination hearing." The appellee made "no claim that the appellants violation of the state regulation is itself actionable under § 1983 or bears upon the claim of constitutional right that appellee asserts under § 1983." In the case at bar the police department directives *did* establish the applicable standard of conduct for the constitutional use of firearms in that they effected Griffin's constitutional rights to be free from unreasonable seizures and deprivations of liberty without due process of law. The deadly force criteria established by the St. Louis Police Department to govern Stoll and Hilke, on their face, reached a premiere and definite constitutional right under the Fourth Amendment.

The Court in *Spruytte* v. *Walters*, 753 F.2d 498 (6th Cir. 1985), when faced with an invalid policy directive and a conflicting state regulation, declared that the prison officials could not base their qualified immunity defense on the invalid policy directive. The Court concluded that the officials violated the administrative rule which created a protected interest and defined the criteria that must be fulfilled before the interest may be defeated. "Because the officials violated the rule and the rule was clearly established at the time of the violation, the officials are not entitled to immunity." *Id.* at 511.

The case at bar is remarkably similar to *Spruytte*. Defendants deadly force standard of conduct was settled by a regulation that precisely corresponds to Griffins Fourth Amendment rights. The police cannot claim surprise on the basis of objective conformity with an inferior statute standard of deadly force which had been debunked by the Eighth Circuit and their own department

regulations. *Mattis* clearly gave judicial recognition to the rights asserted by Griffin. The qualified immunity defense issue should have been decided by the Eighth Circuit to avoid needless repetitive appeals. Consequently, Griffin requests that this Court address this important issue.

III. The Eighth Circuit Court Of Appeals Failed To Apply Fed. R. Evid. 103 In Overruling The Trial Court And Finding Reversible Error During Final Argument Of Counsel.

The Eighth Circuit reversed and remanded Griffin's judgment as to Hilke based upon error in final argument. As a result, it has created a new species of reversal with respect to final argument of counsel: THE MOSAIC[12] HINT PLAIN ERROR RULE. According to this rule, disparate segments of final argument, minutes of oration and pages of transcript apart from other segments of argument, can be glued together, so that parts that came before and after an objection are deemed covered by that objection. The actions of the Eighth Circuit are such a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

With respect to final argument of counsel, the standards heretofore applied are as follows:

FIRST, claims of error are waived unless there is a timely, specific, correct objection to erroneous matter. Fed. R. Evid. 103(a)(1);

SECOND, when statements in closing argument are not objected to at trial, the court of appeals may only

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[12] This comes from the very language used by the Eighth Circuit in its opinion. See A-9a, infra.

review them on a plain error standard, reversing only in extraordinary circumstances where prejudice has in fact been found in the result. Fed. R. Evid. 103(d); *Thomure* v. *Truck Insurance Exchange*, 781 F.2d 141, 143 (8th Cir. 1986);

THIRD, where no objection has been made, the argument must have been plainly erroneous and clearly injurious. *Vanskike* v. *Union Pacific Railroad Co.*, 725 F.2d 1146, 1149 (8th Cir. 1984).

Under the traditional test, the proper place to begin is by focusing directly on the actual statements and objections made thereto. During final argument by Griffin's counsel, the police objected to "when the government, through its police . . ." The objection to this incomplete statement was:

> Your Honor, I am going to have to object to the government. The government is not in this particular lawsuit. This is a lawsuit against two police officers.

See p. E-23a, infra. The Eighth Circuit in reviewing this case substituted a parenthetical note for the real objection and injected a footnote indicating that it was undisputed between the parties that the police made a timely objection and preserved the issue for review on appeal. See A-7a to 8a, infra. However, Griffin at no point conceded that a timely or an appropriate objection was made to preserve the issue for review on appeal. The objection failed to squarely state the point for appeal, and shattered both the metaphor of mosaic hint and the reality of any such hint in the courtroom.

Being unable to find impropriety in the only argument to which the police objected, the Eighth Circuit then seemed to switch gears to find other portions of the argument which might violate the plain error standard. The

court in quoting Griffin's consel's closing, skips 30 lines of argument in order to paste together a hint of impropriety in counsel's use of the word "government." See p. A-7a & E-22a to 23a, infra.

Furthermore, with respect to the argument that immediately followed the objection, the court underlined with disfavor several portions where counsel used the word "they." The Eighth Circuit chose to interpret "they" as a reference to the government. However, it failed to recognize that Griffin's counsel was at a podium five feet from the defendant police officers, gesturing toward them to secure the plain meaning of the argument. That is why there were no objections to those words.[13] This demonstrates the reason why the Eighth Circuit should have deferred to the position of the trial judge, Judge Cahill, since he is the person who both sees and listens to argument, and can best assess its meaning to, and impact on, the listeners in the jury box.

The Eighth Circuit conspicuously avoided declaring these statements to be, alone, clearly unwarranted and plainly injurious. In order to construe a hint, the court ignores other contextual clues, the objection made by the police, and particularly the space and time between various portions of the final argument. To justify reversal, the impropriety must permeate the entire record and particularly the impropriety should be viewed within the context of objections, instructions, and the verdict itself. *Westbrook* v. *General Tire and Rubber Co.*, 754 F.2d 1233, 1238 & 1241 (10th Cir. 1985).

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[13] Throughout this appeal process, it is interesting to note that counsel for the two police officers has never contended that Griffin's counsel was not pointing or gesturing to the two policemen during all the "theys" in his final argument.

In *Westbrook*, the court found specifically that the verdict reflected the prejudice created by the improper arguments and remanded for retrial only on damages. In the case at bar, the Eighth Circuit found only that the argument *could* have resulted in an overly generous award.

Closer to the point is *Kehr* v. *Smith Barney, Upham & Harris Co.*, 736 F.2d 1283 (9th Cir. 1984), in which the court refused to upset a judgment in the face of an isolated improper argument, voiced without objection, since the jury verdict was not excessive. To justify finding final argument so prejudicial as to require reversal, the court in *Kehr* found it essential to examine the verdict itself. The Eighth Circuit did not attempt to determine whether the verdict rationally reflected the damages sustained or whether or not it correlated with, or egregiously departed from, verdicts elsewhere for similar injuries.[14]

In construing a mosaic of hint, the court departs from the recognized standard for finding plain error in the absence of objection. The Eighth Circuit correlated Griffin's "government" references to insurance arguments. But in *Potter* v. *St. Louis San Francisco Ry. Co.*, 622 F.2d 979 (8th Cir. 1980), the Eighth Circuit found that the insurance argument did not establish a violation of the plain error standard and upheld the trial court's discretion.

It was improper for the Eighth Circuit to correlate the mention of government to the mention of insurance. The mention of insurance at trial, except under certain cir-

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[14] Griffin's verdict was not excessive. Plaintiff's counsel participated in both phases of *Robbins* v. *United States*, 722 F.2d 387 (8th Cir. 1983) *on remand*, 593 F.Supp. 634 (E.D. Mo. 1984), in which the court summarily affirmed a bench trial judgment of $1,500,000.00 for injuries similar to Eric Griffin's.

cumstances, has long been considered taboo, with known dangers and consequences. However, the same may not be said of the mention of government in § 1983 actions. The Eighth Circuit concedes that no case was found specifically holding that a closing argument which implies that the government will pay damages in a § 1983 case is prejudicial. See p. A-10a, infra.

Many would argue that plaintiff's "government owes" statement actually would have worked to the policeman's advantage. If the government indemnity hint existed, it would have triggered the jury's self-interest in avoiding higher taxes. Some scholars recommend that in suits against governments and government officials, all defense counsel attempts to insight tax payers' self-interest be prevented. *Julien*, OPENING STATEMENTS, § 12.02 (1981). In *Narcisco* v. *Mouch Chunk Township*, 87 A.2d 233, 369 Pa. 549 (Pa. 1952), the court reversed a defendant's verdict because the argument of defense counsel appealed to tax payers' self-interest. See also, *Perrin* v. *Anderson*, 789 F.2d 1040, 1047 (10th Cir. 1986) (argument that action was against defendants and not state considered prejudicial, but allowed because of punitives); *Roy* v. *Employers Mutual Casualty Co.*, 368 F.2d 902, 905 (5th Cir. 1966) (golden rule in reverse); *Hobson* v. *Wilson*, 556 F.Supp. 1157, 1189 (D.C.D.C. 1982) (no instruction that the United States would not pay a judgment against federal defendants).

The "prejudice" of any remarks about the "government owing" is double edged at best, debatable, and hints not susceptible to the clearly injurious requirement of plain error. Any "hint" of government payment was pregnant with a counter productive appeal to juror's self-interest as tax payers. The objection by counsel for the police erased any prejudice which may have resulted from counsel for

Griffin's argument. Furthermore, the "government owes" statements were voiced first in the rhetorical abstract, and secondly as a self-confined comment on *Bivens* v. *Six Unknown Agents*. The subsequent argument directly reinforced the police objection espousing their individual status, by referring to the defendants as "they." The mosaic in the context of the objection refracts the hint in many directions, thus defying the test that the message was clearly injurious, or plainly unwarranted.

In addition, Griffin maintains that a reference to government in a § 1983 action is not objectionable. Griffin's counsel's interrupted statement is merely the mirror image of the beginning of § 1983; "When any person acting under color of law" is equivalent to "the government through its police." Moreover, the words were a statement of the obvious since everyone knew these were policemen defendants.

The Eighth Circuit clearly violated Fed. R. Evid. 103 in creating its own Mosaic Hint Plain Error Rule. It is a clear departure from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JAMES E. HILLVERSON, JR.
(Counsel of Record)
GRETCHEN GODAR-MYERS
1010 Market, Suite 1550
St. Louis, MO 63101
(314) 421-2313
Counsel for Petitioner Griffin

APPENDIX

APPENDIX

A —Opinion dated November 6, 1986, of the United States Court of Appeals for the Eighth Circuit 1a

B —Judgment dated November 14, 1984, of the United States District Court for the Eastern District of Missouri Eastern Division 11a

Memorandum and Order dated January 3, 1986, of the United States District Court for the Eastern District of Missouri, Eastern Division denying motion for judgment notwithstanding the verdict or in the alternative for a new trial 12a

C —Judgment dated November 6, 1986, in the United States Court of Appeals for the Eighth Circuit 18a

Order dated January 22, 1987, of the United States Court of Appeals for the Eighth Circuit denying motion for rehearing or rehearing en banc 20a

D —Transcript—Judge Cahill's reading of the Verdict Directing instructions 21a

E —Transcript—Griffin's Counsel's Summation on Rebuttal 22a

APPENDIX A

United States Court of Appeals

FOR THE
EIGHTH CIRCUIT

No. 86-1152

ERIC A. GRIFFIN,

Appellee,

v.

GREGORY HILKE AND
OFFICER FRANCIS STOLL,

APPELLANTS.

Appeal From The United States District Court
For The Eastern District Of Missouri

Submitted: September 10, 1986
Filed: November 6, 1986

BEFORE: ROSS, CIRCUIT JUDGE, FLOYD R. GIBSON, SENIOR CIRCUIT JUDGE, AND MAGILL, CIRCUIT JUDGE.

MAGILL, CIRCUIT JUDGE.

St. Louis police officers Gregory Hilke and Francis Stoll appeal the district court's judgment based on a jury verdict awarding Eric A. Griffin $750,000 in damages under 42 U.S.C. § 1983. For the reasons discussed below, we hold that the district court erred in denying defendants' motion for judgment notwithstanding the verdict or a new trial. We reverse

the judgment of the district court, dismiss defendant Stoll and remand for a new trial for defendant Hilke.

I. BACKGROUND

At approximately 12:30 a.m. on February 18, 1978, Officer Stoll heard on his radio that shots had been fired at 3971 Lafayette in St. Louis. He drove there and saw three men fighting on the sidewalk. He stopped his car and placed it in such a manner as to prevent a car with another man inside from leaving the scene. He then exited his car and attempted to break up the fight. At this time, one of the three men, Griffin, began to leave. Stoll heard one of the others say that Griffin had their money. Stoll called out "come back here nigger" and fired a warning shot in the air. Griffin fled on foot with Stoll in pursuit. Stoll followed Griffin around several buildings and over at least one fence, until he lost Griffin at McRee, an east-west street that runs parallel one block to the north of Lafayette.

During the chase, Stoll, carrying a hand-held radio, sent a broadcast over police airways that he was chasing a suspect wanted for a possible assault and robbery. Although the parties dispute whether Stoll told the radio dispatcher that the suspect was armed, Stoll concedes that the broadcast which followed included the words "is armed" or "armed suspect." Stoll also testified that he based his radio report on the broadcast he initially heard and on his perception that Griffin was running with his coat draped over his arm.

Officer Hilke heard Stoll's broadcast warning from his patrol car which was parked approximately one-and-one-half to three blocks away from 3971 Lafayette, the site of the alleged original shots. In the radio transmission, Hilke heard the phrase "armed" or "is armed," which Griffin contends was later inserted into the tape. Hilke drove to the alley behind 3971 Lafayette, exited his car and looked around. He saw Griffin run across the alley. Hilke also claimed that Griffin had his coat draped over his arm. Hilke took out his gun and pursued Griffin.

Griffin ran north toward McRee. When Hilke reached McRee he called to Griffin to stop. Griffin turned around and saw Hilke, but continued to flee. Hilke tripped and fell down some steps leading from the sidewalk up to the house at 3928 McRee. When he regained his balance, Hilke fired a warning shot. Griffin continued to run, heading north across McRee, and west down an alley running parallel to McRee. He then cut through yards, jumping over fences toward Blaine Avenue, with Hilke in pursuit. Hilke testified that, "As [Griffin] would go over a fence, I would be approaching the fence and he would be in the middle of a yard as I was * * * going over one of the other fences." (Tr. 11/5 at 78.)

Finally, from a distance of 30 to 40 feet, Hilke shot Griffin in the leg. Hilke testified that he believed Griffin's escape was imminent. He did not know how many fences lay ahead of Griffin. He aimed at the bottom of Griffin's leg because he did not want to kill Griffin.

Hilke testified that he was afraid to run up to Griffin for fear he would be shot. Hilke alsos testified that he was concerned that Griffin might shoot other officers who had been called to the scene and were unaware of Griffin's precise location. The police did not find a gun on Griffin's person or in the surrounding area, however.

As a result of the shooting, Griffin's leg was amputated below the knee. Following the loss of his leg, Griffin has been hospitalized for depression and has attempted suicide.

In July 1978, Griffin filed suit against Hilke, in Missouri state court, alleging tortious battery. Griffin subsequently amended his petition several times, eventually alleging civil rights violations under 42 U.S.C. § 1983 against both Stoll and Hilke. The case was removed to federal district court in February 1983. Following a six-day trial, in November 1984, the jury returned a verdict against both Stoll and Hilke for damages of $750,000. The district court denied Stoll's and Hilke's motion for judgment n.o.v. or, in the alternative, for a new trial. This appeal followed.

II. DISCUSSION

A. Deprivation Of Liberty Without Due Process.

Stoll and Hilke ("the police") contend that the district court erred by first denying their motion to dismiss on the ground that Griffin failed to state a cause of action, and second, by denying their motion for judgment n.o.v. or a new trial.

1. Stoll.

The police argue that the only aspect of Stoll's conduct which could be deemed a cause of Griffin's injury was his broadcast that he was chasing a suspect wanted for a possible assault and robbery. Stoll allegedly based this broadcast on (a) the initial report that shots had been fired; (b) the fight which he saw; (c) the claim he heard that Griffin had taken money; (d) Griffin's flight; and (e) his perception that Griffin was running with his coat over his arm. The police assert that, under the circumstances, Stoll's conduct did not even amount to ordinary negligence, and thus did not rise to the level of a constitutional violation.

The Supreme Court has held that the due process clause "is not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels* v. *Williams*, 106 S.Ct. 662, 663 (1986); *see also New* v. *City of Minneapolis*, 792 F.2d 724, 725 (8th Cir. 1986) (per curiam) (dictum). Thus a plaintiff must show more than mere negligence to recover for a due process violation under section 1983. *See Daniels*, 106 S.Ct. at 665. In contrast, an allegation that a law enforcement officer used excessive force in apprehending a suspect or effecting an arrest automatically implicates the substantive component of the due process clause in terms of fourth amendment and liberty interests. *See Tennessee* v. *Garner*, 105 S.Ct. 1694, 1699-1707 (1985); *New*, 792 F.2d at 726.

We agree with the police that the district court erred in denying the police's motion for judgment n.o.v. with regard to Stoll. In reviewing the district court's denial of a motion for

judgment n.o.v., we consider the evidence in the light most favorable to the prevailing party, assuming as true all facts that the prevailing party's evidence tended to prove, and giving the prevailing party the benefit of all favorable inferences. This court will not overturn the district court's ruling on a motion for judgment n.o.v. if the evidence is susceptible of any reasonable inference sustaining the prevailing party's position. *See Williams* v. *Ryder/P.I.E. Nationwide, Inc.*, 786 F.2d 854, 857 (8th Cir. 1986).

We find that the evidence was insufficient to support Griffin's claim against Stoll. Stoll's conduct in transmitting an erroneous broadcast did not rise to the level of a substantive constitutional violation, because he never used force against Griffin or otherwise committed an unreasonable seizure. *Compare Tennessee* v. *Garner*, 105 S.Ct. at 1697. To recover against Stoll under section 1983 for a due process violation, Griffin was required to plead and prove that Stoll was more than negligent. *See Daniels*, 106 S.Ct. at 663; *see also New*, 792 F.2d at 725-726 (dictum). We note that Griffin's complaint alternatively alleged that Stoll intentionally transmitted a false broadcast.[1] The record fails to disclose any evidence that Stoll was more than negligent, however. Accordingly, we reverse the district court's denial of judgment n.o.v. with regard to Stoll and dismiss.

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[1] Count IV of Griffin's Third Amended Petition alleged in pertinent part:

Defendant Stoll *deliberately and intentionally* communicated Plaintiff was a fleeing felon when Defendant Stoll *knew* such communication was false, and Defendant Stoll *deliberately and intentionally* communicated and broadcast that it was necessary to use deadly force to arrest Plaintiff when Defendant Stoll *knew* such message was false. As a direct result of either the negligence or intentional act of Defendant Stoll as aforesaid, Defendant Stoll initiated and instituted the battery and shooting against Plaintiff by Officer Hilke. [Emphasis supplied.]

2. Hilke.

With regard to Hilke, the police argue that he based his decision to fire at Griffin on (a) the initial report of shots fired; (b) the broadcast of the chase of an assault and robbery suspect; (c) the broadcast of the word "armed" in connection with the chase; and (d) his perception that Griffin was fleeing with his coat over his arm. The police assert that Hilke's conduct did not rise to the level of gross negligence or recklessness. They contend that Hilke followed the policy of the Board of Police Commissioners which permitted use of deadly force under the circumstances. They argue further that even if the use of deadly force was an "unreasonable seizure," in violation of the fourth amendment, there was no violation of Griffin's right to procedural due process. They contend that Missouri law provides an adequate process by which a person subjected to an unreasonable seizure may receive compensation.

Allegations of brutality by law enforcement personnel apprehending a suspect or effecting an arrest are typically analyzed in terms of fourth amendment and liberty interests. If sufficiently egregious, a deliberate use of excessive force in this context can implicate the substantive fourth amendment guarantee against unreasonable seizures, the substantive due process right to be free from abusive governmental conduct "offensive to human dignity," or both. *See e.g., Tennessee* v. *Garner,* 105 S.Ct. at 1699-1707; *New,* 792 F.2d at 726; *Fernandez* v. *Leonard,* 784 F.2d 1209, 1214-17 (1st Cir. 1986); *Patzner* v. *Burkett,* 779 F.2d 1363, 1371 (8th Cir. 1985); *Davis* v. *Forrest,* 768 F.2d 257, 258 (8th Cir. 1985). Use of deadly force against a fleeing felon is an unreasonable seizure violating the fourth amendment, unless it is necessary to prevent the suspect's escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee* v. *Garner,* 105 S.Ct. at 1697. Moreover, such an intentional abuse of official power "implicates the substantive component of the due process clause regardless of the availability of state remedies." *New,* 792 F.2d at 726; *see also Wilson* v. *City of North Little*

Rock, No. 85-2060, slip op. at 8-9 (8th Cir. Sept. 12, 1986); *McClary* v. *O'Hare*, 786 F.2d 790, 793 (9th Cir. 1986). *Accord*, *Daniels*, 106 S.Ct. at 677-678 (Stevens, J. concurring in judgments).

We hold that the district court did not err in denying the police's motion for judgment n.o.v. or a new trial with regard to Hilke on due process grounds. Hilke's conduct in shooting Griffin to effect his arrest implicated a substantive constitutional guarantee. *See Tennessee* v. *Garner*, 105 S.Ct. at 1699-1707; *New*, 792 F.2d at 726. The existence of state remedies is irrelevant. *Wilson*, No. 85-2060, slip op. at 8-9 (8th Cir. Sept. 12, 1986); *New*, 792 F.2d at 725-726.

B. Improper Closing Argument.

The police contend that the district court erred in overruling their objection to statements in Griffin's closing argument. They argue that they suffered prejudicial error because the argument both explicitly stated and implied that the government would be responsible for paying any judgment:

> [Counsel for Griffin:] * * * When the police officer makes a careless, unprofessional judgment using his weapon, *he is the representative of the government and the government owes.* * * * Nobody, no jury can inflict mutilation as a punishment. Eric Griffin suffers mutilation. That is his punishment and we say when that happens, it deserves to be compensated. *When the government through its police officers —*

[Objection by counsel for police, which court overruled.]

> * * * *
>
> [Counsel for Griffin:] The thin blue line, as he calls, the thin blue line. There's a book by that title, by the way. The thin blue line. When the thin blue line crosses over the line and they go into your house as they did in one case called *Bibbins* v. *Six Unknown Agents* [sic] and they tear a house apart because they think there's narcotics in there and it proves that they didn't think hard enough and they didn't find any, *by God the government owes those people to*

> *replace their house*. Or when they stop your car and rip out your dashboard because, well, they think but they haven't thought hard enough about it, by God *they owe you for that. They're obligated to repay* that. And nowhere is it more important, ladies and gentlemen, that when they think that they need to shoot, they have, quote, good reason to shoot but they don't know the actual rules and regulations about shooting, when they make a mistake, by God, *they owe for it.*

[Tr. 11/13 at 81-83. Emphasis supplied.][2]

Whether prejudice has resulted from a closing argument is a procedural question to be determined by federal law. *See Vanskike* v. *Union Pacific Railroad Co.*, 725 F.2d 1146, 1149 (8th Cir. 1984). The district court is in a better position than the court of appeals to determine whether prejudice has resulted from a closing argument. Therefore, to constitute reversible error, statements made in closing argument must be plainly unwarranted and clearly injurious. We will not disturb the district court's evidentiary rulings during closing argument unless there has been an abuse of discretion. *Vanskike*, 725 F.2d at 1149.

The general rule in the state courts and under Fed. R. Civ. P. 61 is that interjection of the fact that the defendant is protected by insurance or other indemnity may be prejudicial error requiring reversal. *See Transit Casualty Co.* v. *Transamerica Insurance Co.*, 387 F.2d 1011, 1013 (8th Cir. 1967) (diversity case stating interjection of issue of reinsurance was prejudicial error under Rule 61 and Missouri law); *Halladay* v. *Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967) (diversity case citing numerous authorities); *see also Higgins* v. *Hicks Co.*, 756 F.2d 681, 684-85 (8th Cir. 1985) (evidence of State of South Dakota's liability insurance not admissible under Fed. R. Evid. 411 to eliminate bias of jurors as taxpayers).

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[2] The parties do not dispute that the police made a timely objection to the alleged prejudicial argument and raised the issue in their motion for judgment n.o.v., thus preserving the issue for review on appeal.

The reasoning behind this rule with regard to testimony or argument concerning the defendant's insurance or indemnity protection is that it will result in an unduly generous award of damages by the jury. *Transit Casualty*, 387 F.2d at 1013, *quoting Olian* v. *Olian*, 52 S.W.2d 673 (Mo. 1933); *cf. Ouachita National Bank* v. *Tosco Corp.*, 686 F.2d 1291, 1301 (8th Cir. 1982) (no prejudice because jurors already knew that defendant carried insurance), *aff'd* 716 F.2d 485, 488 (8th Cir. 1983) (en banc). *Compare Eichel* v. *New York Central Railroad Co.*, 375 U.S. 253, 255 (1963) (likelihood of mususe by jury outweighs value of evidence that plaintiff received disability payments). *See generally* Fed. R. Evid. 411 advisory committee's note. Similarly, in applying Missouri law, this court has held that references in closing argument to the wealth of defendant's parent corporation could constitute prejudicial argument. *Gearhart* v. *Union Corp. of America*, 781 F.2d 147, 153 (8th Cir. 1986) (reversing on other grounds and instructing district court not to permit such remarks on retrial).

We hold that the district court's allowance of Griffin's counsel's closing remarks without special admonition or instruction to the jury constituted prejudicial error sufficient to require reversal. *See Halladay*, 381 F.2d at 112 (admonition or instruction to jury to ignore prejudicial statements may excuse allegedly prejudicial argument). Griffin's counsel repeatedly referred to the police as representatives of the government and explicitly stated twice that "* * * the government owes." In the context of the entire mosaic, these statements both explicitly and impliedly directed the jury that the police would not pay but their employer would.[3] The police do not cite any authority

[3] We note that under section 1983, the actions of a state entity's employees are attributed to the state entity itself if those actions are in furtherance of the entity's "policy or custom." *Pembaur* v. *City of Cincinnati*, 106 S.Ct. 1292, 1298-99 (1986); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Although Griffin joined both the City of St. Louis and the St. Louis Board of Police Commissioners as defendants, the

specifically holding that a closing argument which implies that the government will pay damages in a section 1983 case is prejudicial. We see no distinction between this and the injection of testimony or argument concerning insurance, however. We believe that the jury's apprehension that the government would be responsible for paying damages could result in an overly generous award of damages. Therefore, the district court committed prejudicial error requiring reversal of the judgment. *See Gearhart*, 781 F.2d at 153; *Transit Casualty*, 387 F.2d at 1013; *see also* Fed. R. Civ. P. 61.

III. CONCLUSION

We hold that the district court erred in denying the police's motion for judgment n.o.v. or a new trial based on (1) Griffin's failure to present evidence that Stoll was more than negligent; and (2) prejudicial statements during closing argument. We do not address Stoll's and Hilke's arguments concerning the defense of qualified immunity and application of comparative fault principles because these questions are not necessary to our decision. *See Hutchinson Utilities Commission* v. *Curtiss-Wright Corp.*, 775 F.2d 231, 238 (8th Cir. 1985). Accordingly, we reverse and remand this case to the district court for a new trial on both liability and damages regarding defendant Hilke, and dismiss this action with regard to defendant Stoll.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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district court record indicates that Griffin voluntarily dismissed them as defendants immediately before trial. It was therefore inappropriate for Griffin's counsel to refer to the city or the Board of Police Commissioners as responsible for payment of damages, because they were not parties to this action.

We do not decide today what the effect of a special admonition or curative instruction to the jury would have been. We hold only that Griffin's counsel's repeated references to "the government" as responsible for payment of damages, in the context of the closing argument in this case, constituted prejudicial error.

APPENDIX B

United States District Court

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

83-247C(4)

ERIC A. GRIFFIN,

Plaintiff,

v.

GREGORY HILKE AND
FRANCIS STOLL,

Defendants.

FILED:
Nov. 14, 1984

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Clyde S. Cahill, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

It is ORDERED and ADJUDGED that plaintiff recover of the defendants, Gregory Hilke and Francis Stoll, the sum of $750,000.00, with interest at the rate per annum allowable by law and the costs of the action.

EYVON MENDENHALL, CLERK

/s/ _____
By deputy clerk

Dated 11-14-84

United States District Court

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 83-0247-C (4)

ERIC A. GRIFFIN,

Plaintiff,

v.

THE CITY OF ST. LOUIS, ET AL.,

Defendants.

FILED:
Jan. 3, 1986
EYVON MENDENHALL
E. DISTRICT OF MO.
U.S. DISTRICT COURT

MEMORANDUM AND ORDER

This matter is before the Court on motion of defendant Hilke for new trial and the motion of defendant Stoll for judgment notwithstanding the verdict (judgment n.o.v.) or new trial. Plaintiff Eric Griffin brought this action pursuant to 42 U.S.C. § 1983 to recover damages for injuries sustained when defendants, City police officers desiring to arrest a fleeing plaintiff, gave chase and subsequently shot him (plaintiff).[1] Plaintiff's

[1] The evidence at trial established that defendant Stoll, the first officer on the scene to give chase after plaintiff, fired a warning shot into the air. Officer Hilke, who was approaching from the opposite end of the street, took up the pursuit of plaintiff and fired the shot that injured plaintiff.

case was submitted to the jury on the ground that defendants used excessive force in arresting him. The jury returned a verdict against defendants in the amount of $750,000, and the instant motions followed.

Defendant Stoll's Motion for Judgment n.o.v. or New Trial.

In support of his motion for judgment n.o.v. or new trial, defendant Stoll advances the following grounds: (1) because the use of deadly force in the situation presented was proper and lawful, jury instruction numbered 16 was faulty and no causation was presented on which to impose liability; (2) liability in a § 1983 action is personal, and jury instructions numbered 16 is erroneous to the extent it makes officer Stoll liable for the conduct of a fellow officer; (3) there exists no legal causation between the firing of the warning shot and the subsequent injury to plaintiff; (4) prejudicial and inflammatory remarks made by plaintiff's counsel denied defendant the right to a fair trial.

A motion for judgment n.o.v. is to be granted "only where the evidence points 'all one way' and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Kayser* v. *Rockwell Graphic Systems, Inc.*, 666 F.2d 1233, 1234 (8th Cir. 1982), *quoting Giordano* v. *Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970). In ruling on a motion for judgment n.o.v., all evidence is to be construed in the light most favorable to the nonmoving party, all conflicts in the evidence must be resolved in a manner favoring the verdict, all facts which the opposing party's evidence tends to prove must be assumed, and the moving party is to be given the benefit of all reasonable inferences. *Cleverly* v. *Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979). After considering the evidence in light of all the foregoing, the Court finds that this case was sufficient for submission to the jury. This is not an instance where the Court can say that reasonable jurors could not have returned the verdict they did. Consequently, the Court will not overturn the verdict on this basis.

A motion for new trial is addressed to the discretion of the trial court. In ruling on such a motion, the Court is not limited to viewing the evidence in the light most favorable to the prevailing party, but may weigh evidence, disbelieve witnesses, and set aside a jury verdict where it has determined the verdict to be against the clear weight of the evidence, *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. den.* 410 U.S. 930, 93 S.Ct. 137, 35 L.Ed.2d 592 (1973), that is the result of passion or prejudice, *id.*, or the verdict is excessive. *Ouachita National Bank* v. *Tosca Corp.*, 686 F.2d 1291 (8th Cir. 1982); *Slatton* v. *Martin K. Eby Construction Co., Inc.*, 506 F.2d 505, 508, (8th Cir. 1974), *cert. den.*, 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed.2d 88 (1975).

Jury Instructions.

Defendant Stoll has assailed the propriety of jury instruction 16 on two grounds. First, defendant argues that jury instruction 16 is faulty because the use of force in the situation was proper and lawful and there was, thus, no causation on which to impose liability. Secondly, defendant contends instruction 16 is erroneous to the extent it makes defendant Stoll liable for the conduct of a fellow officer. Instruction 16 reads as follows:

> On plaintiff's Section 1983 action against defendant Stoll, your verdict must be for Eric Griffin if you believe:
>
> First, defendant Hilke used unreasonable force to seize and arrest plaintiff; and
>
> Second, defendant Stoll contributed to cause plaintiff to be subjected to such an arrest by shooting during his pursuit of plaintiff, or by failing to adequately inform others by radio of the offenses which he had probable cause to believe that plaintiff had committed.
>
> Third, as a proximate result of defendant Hilke's use of unreasonable force, plaintiff was injured and damaged.

Title 42 U.S.C. § 1983 imposes liability on those who, under color of statute subject or cause to be subjected any citizen to a deprivation of any rights, privileges, or immunities secured by

the Constitution and laws. While liability under § 1983 must be predicated on some type of personal involvement or participation, the requisite causal connection can be established by a showing that the tortfeasor sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. *Johnson* v. *Duffy*, 588 F.2d 740 (9th Cir. 1978); *see also Owens* v. *Haas*, 601 F.2d 1242 (2d Cir. 1979), *cert. den.*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1980); *Hobson* v. *Wilson*, 556 F.Supp. 1157 (D.C. D.C. 1982); *cf. Monell* v. *Dept. of Social Services*, 436 U.S. 658, 694 n.58, 98 S.Ct. 2018, 2037 n.58, 56 L.Ed.2d 611 (1978). Instruction 16 correctly states the applicable law, does not make defendant vicariously liable for a fellow officer's conduct, and was clearly supported by the evidence adduced at trial which revealed: (1) that defendant Stoll's firing of the warning shot was wrongful conduct under the circumstances; (2) that defendant's radio broadcast calling for plaintiff's apprehension for robbery was unsubstantiated by the youths with whom plaintiff was arguing at the time of the incident as they all testified no one told defendant plaintiff had robbed them; and (3) that officer Hilke, who heard defendant Stoll's broadcast and warning shot, gave chase, and subsequently shot plaintiff.

Under all the foregoing, the jury could have quite properly found that defendant Stoll's firing of the warning shot and his radio broadcast set in motion those acts which culminated with plaintiff's shooting. Consequently, defendant Stoll's objection on causation grounds is overruled. The Court also overrules defendant Stoll's objection relative to the closing remarks of plaintiff's counsel. In its preliminary instructions the Court told the jury that statements made by counsel are not evidence; moreover, the Court sustained defendant's objections to the statements. Lastly, the Court sees no prejudice obtaining here as would require a new trial. Defendant Stoll has also contended that the use of force in the situation was lawful and proper. For reasons which will shortly appear, defendant's contention in this regard is overruled.

Defendant Hilke's Motion For A New Trial.

In support of his motion for new trial, defendant Hilke advances the following: (1) the trial court erred in not offering a good faith instruction to the jury as to the propriety of defendant's conduct in using deadly force to apprehend plaintiff; (2) the credible weight of the evidence indicated the use of deadly force was proper and lawful, and as a matter of law defendant was entitled to use all necessary means to apprehend plaintiff; and (3) prejudicial remarks made by plaintiff's counsel denied defendant a fair trial.

In response to defendant's assignment of error based on the Court's failure to give a good faith instruction, the Court notes for the record that defendant neither offered a good faith instruction nor objected to the Court's failure to give one. Under Fed. R. Civ. P. 51, defendant has now waived this objection. Moreover, defendant Hilke neither pled nor was any evidence adduced to establish his entitlement to a good faith instruction. Qualified or good faith immunity is an affirmative defense that must be pled by defendant. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 3966 (1982); *Gomez* v. *Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Harris* v. *Purch*, 677 F.2d 681 (8th Cir. 1982). Consequently, defendant's arguments relative to the Court's failure to give a good faith instruction are overruled. The Court also overrules defendant's second point of error. Contrary to defendant's position, the credible weight of the evidence indicated defendant's use of deadly force in the situation was improper. Defendant's conduct in shooting plaintiff was in direct contravention of the rules promulgated by the St. Louis Police Department.[2]

---

[2] The police department rules were promulgated in response to the Eighth Circuit Court of Appeals decision in *Mattis* v. *Schnarr*, 547 F.2d 1007 (8th Cir. 1976) (en banc), *vacated as moot sub nom. Ashcroft* v. *Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977). In *Mattis*, the Eighth Circuit ruled unconstitutional a Missouri statute which permitted the police to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony and

Though Officer Hilke testified as to his belief that plaintiff was concealing a weapon under his coat, the Court rejects this assertion, particularly in light of the officers' other testimony that plaintiff was running like a madman over fences, through gangways, and around obstacles with a coat draped over his arm. In the Court's view, defendant's belief that plaintiff was armed would not be reasonable. Moreover, plaintiff's expert testified without contradiction that defendant's use of deadly force was unreasonable. Thus, the weight of the evidence favored a finding that defendant's use of force was improper.

The Court has previously indicated in this opinion that the remarks made by plaintiff's counsel during closing argument were not of such nature as to warrant a new trial. Rather than reiterate the points relied on in reaching that conclusion, the Court will simply overrule defendant's contention for those reasons previously stated. Accordingly,

IT IS HEREBY ORDERED that defendants' motions for judgment notwithstanding the verdict or new trial are DENIED.

Dated this 3rd day of January, 1986.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

---

who does not threaten the lives of either the arresting officer or others. Police department rules permitted the use of deadly force if: (1) the officer reasonably believes the suspect used or threatened to use deadly force in the commission of a crime or felony, or (2) the officer reasonably believes the suspect would use deadly force against the officer or others if not apprehended. The evidence and testimony at trial indicated that officers Hilke and Stoll were unaware of and thus, did not know, either the statutory or their own departmental rules.

APPENDIX C

United States Court of Appeals

FOR THE
EIGHTH CIRCUIT

No. 86-1152EM

ERIC A. GRIFFIN,

Appellee,

v.

GREGORY HILKE, ET AL.,

Appellants.

FILED:
Jan. 30, 1987
EYVON MENDENHALL
U.S. DISTRICT COURT
E. DISTRICT OF MO.

Appeal From The United States District Court For The Eastern District of Missouri

JUDMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is reversed and remanded to the district court for a new trial on both liability and damages regarding defendant Hilke, and dismiss

this action with regard to defendant Stoll in accordance with the opinion of this Court.

November 6, 1986

A true copy

ATTEST: /s/ ROBERT D. ST. VRAIN
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
MANDATE ISSUED: JANUARY 29, 1987

United States Court of Appeals

FOR THE
EIGHTH CIRCUIT

No. 86-1152-EM

ERIC A. GRIFFIN,

Appellee,

v.

GREGORY HILKE, ET AL.,

Appellants.

Appeal From The United States District Court For The Eastern District of Missouri

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Heaney and McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

January 22, 1987

Order Entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN
CLERK, UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX D

Now the next instructions, the next two in fact are what we call the verdict directors. These are the instructions that tell you what the essential elements of the theory the Plaintiff's case is and these are the ones that you are to find, if you find in favor of the Plaintiff.

Instruction number 15; Your verdict must be for the plaintiff on his section 1983 claim against Defendant Hilke if you believe first, defendant Hilke used unreasonable force to seize and arrest plaintiff; and second that such arrest was a proximate cause of injury and consequent damage to the plaintiff. In deciding whether unreasonable force was used, you're instructed that the use of deadly force such as shooting by a police officer is justified only when the officer reasonably believes either the crime for which the arrest is made involved conduct including the use or threatened use of deadly force and there is no other reasonable means to arrest the person, or there is substantial risk that the person to be arrested will cause the death or serious bodily injury if his apprehension is delayed and there is no other reasonable means to arrest the person.

Now that was the verdict director as to the defendant Hilke. Number 16 is the verdict director as to the Defendant Stoll.

On plaintiff's Section 1983 action against defendant Stoll your verdict must be for the plaintiff if you believe first, defendant Hilke used unreasonable force to seize and arrest plaintiff; second, defendant Stoll contributed to cause plaintiff to be subject to such an arrest by shooting during his pursuit of plaintiff or by failing to adequately inform others by radio of the offenses which he had probable cause to believe that plaintiff had committed. Third as the proximate result of defendant Hilke's use of unreasonable force, plaintiff was injured and damaged.

APPENDIX E

REBUTTAL

MR. HULLVERSON: Thank you, your Honor, Jack. Ladies and gentlemen, Mr. Hilke's not an ordinary man. He carries a gun. Mr. Stoll's not an ordinary man. They carry guns. We don't carry guns. They do. That is the essence of their profession. Their obligation is to protect the public, maintain the peace and one aspect of their profession, ladies and gentlemen, is that apprehension of suspects and one aspect of their profession, ladies and gentlemen, is the use of a weapon. And it's fundamental that professionals should know the essence of their professional rules and duties. Engineers do, doctors do, lawyers do, architects do, pilots do, police officers have to also. When you've got a gun at your side, you've got more power than anybody else in this society. And for you not to know when you can and when you cannot use it is unforgiveable. And ladies and gentlemen, when the Titanic goes down, the ship company owes. When the Hyatt Regency collapses because somebody's been unprofessional, they owe. When the doctor makes a careless mistake as they do, they owe. When the lawyer makes a careless mistake, professional mistake, he owes. When the police officer makes a careless, unprofessional judgment using his weapon, he is the representative of government and government owes. That's the trade-off we make. I agree. I want the police to be safe. I understand that. I'm all in favor of it. And if in their haste and in the problems that they confront they decide to shoot before the rules and regulations of their profession permit them to shoot, because they're scared, fine, they're protected. But by God, so is the victim. He's got rights to be protected too. It's no sin, it's not crime to run away scared, especially under the circumstances of this case. And that's the trade-off we make. That's the trade-off the law provides. The constitution, the founders of the country who pledged their lives, their fortunes and their sacred honor knew that this would happen. They guaranteed us the government would not interfere, would not make any unreasonable search or seizure,

any unreasonable arrest. Well ladies and gentlemen, when in the course of professional duties the police officer goes beyond mere arrest, when he goes beyond apprehension, he takes the place of judge and jury and appeal and there is no appeal from a gunshot. That's it. That's final. The sentence imposed by a gunshot is greater and more difficult and more humiliating than any sentence any Court in this country can impose. The worst you can do in this counrty, absolute worst is a death sentence, and you can only impose that when you found beyond reasonable doubt, beyond reasonable doubt that that's the guy who did it and it was horrible crime that he committed. He did it and it was horrible. There's no redemption for him and he deserves to be put to death. Nobody, no jury can inflict mutilation as a punishment. Eric Griffin suffers mutilation. That is his punishment and we say when that happens, it deserves to be compensated. When the government through it's police officers—

MR. FITZGIBBONS: Your Honor, I'm going to have to object to the government. The government is not in this particular lawsuit. This is a lawsuit against these two police officers.

MR. HULLVERSON: Well—

THE COURT: But the argument is appropriate.

MR. HULLVERSON: The thin blue line, as he calls, the thin blue line. There's a book by that title, by the way. The thin blue line. When the thin blue line crosses over the line and they go into your house as they did in one case called *Bivens* v. *Six Unknown Agents* and they tear a house apart because they think there's narcotics in there and it proves that they didn't think hard enough and they didn't find any, by God the government owes those people to replace their house. Or when they stop your car and rip out your dashboard because, well, they think but they haven't thought hard enough about it, by God they owe you for that. They're obligated to repay that. And nowhere is it more important, ladies and gentlemen, that when

they think that they need to shoot, they have, quote, good reason to shoot but they don't know the actual rules and regulations about shooting, when they make a mistake, by God, they owe for it.

Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERIC A. GRIFFIN,
Petitioner,

vs.

GREGORY HILKE and FRANCIS STOLL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314 City Hall
St. Louis, Missouri 63103
(314) 622-3361

Attorneys for Respondents

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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No. 86-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERIC A. GRIFFIN,
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vs.

GREGORY HILKE and FRANCIS STOLL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Gregory Hilke and Francis Stoll respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit opinion in this case. That opinion is reported at 804 F.2d 1052 (1986).

STATEMENT OF THE CASE

It would unduly lengthen this brief to correct each and every inaccuracy and omission contained in petitioner's statement of the complicated facts of this case. Instead, respondents incorporate by reference the statement of facts in the opinion below (Pet. App. 2a-3a), which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Does Not Raise Important And Unsettled Issues And There Is No Contemporary Conflict Among The Circuits.

a. Petitioner asks this Court to grant his petition to determine whether a remote actor may be held liable pursuant to 42 U.S.C. §1983 for constitutional injuries directly inflicted by another where such constitutional injuries would not have been suffered but for the remote actor's negligence. Specifically, he argues that respondent Stoll can be held liable for a seizure made by respondent Hilke partly in reliance upon the communication of inaccurate information by Stoll, where Stoll's miscommunication was arguaby the result of Stoll's negligent evaluation of the situation that confronted him. It can scarcely be denied that this issue is an important one; however, if the issue has not been fully settled by the Court's earlier pronouncements, it has been all but settled.

There have been two lines of cases that have focused on §1983 liability of remote actors. One line, represented most prominently by *Rizzo v. Goode,* 423 U.S. 362 (1976), considers the liability of public employees who supervise other public employees for the constitutional torts committed by their supervisors. Significantly, it appears that the claimed constitutional violations in *Rizzo* were Fourth Amendment ones just as in the case at bar. The *Rizzo* district court found that, as a result of defendant supervisors' decision not to change police procedures, constitutional violations would occur. *Id.* 423 U.S. at 371. Plaintiff argued that defendants' failure to act breached a constitutional duty that defendants were obligated to acquit. *Id.* 423 U.S. at 376. The Court rejected plaintiff's theory, contrasting the case before the Court with *Hague v. CIO,* 307 U.S. 496 (1939), noting that liability was imposed on the remote actors in *Hague* for "the adoption and enforcement of *deliberate* policies...", *Rizzo,* 423 U.S. at 374 (emphasis added); with

Allee v. Medrano, 416 U.S. 802 (1974), where the named defendants themselves engaged in an "*intentional,* concerted, and indeed conspiratorial effort...", *Rizzo,* 423 U.S. at 375 (emphasis added); and with school desegregation cases where the defendants were officials who were "found by their own conduct" to have denied plaintiffs' rights. *Rizzo,* 423 U.S. at 377. The Court's ruling in *Rizzo,* as fairly characterized by the dissenting justices, was that an "official is not subject to the strictures of 42 U.S.C. §1983 unless he directs the deprivation of constitutional rights." *Rizzo,* 423 U.S. 384 (Blackmun, J., dissenting).

Another line of cases dealing with the liability of remote actors is *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), and *Monell's* progeny. Such cases consider whether a city may be liable under §1983 where the city's policy causes a constitutional injury. Because the injury is immediately caused by a natural person, the city's position is normally that of a remote actor. Indeed, *Monell* itself implicitly recognizes the affinity that cases involving municipal liability have for cases involving supervisory liability by the opinion's reference to *Rizzo.* See *Monell,* 436 U.S. at 693 n.58.

Justice O'Connor, on behalf of four justices, recently summarized the *Monell* line of cases as follows:

> "Given the importance, under §1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See e.g., Oklahoma City v. Tuttle, 471 U.S. at 824-825 n.8 (requiring "affirmative link" between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312 (1981) (municipal policy must be "moving force" behind constitutional deprivation). In Monell itself, the policy at issue commanded the deprivation of constitutional rights."

City of Springfield v. Kibbe, 55 U.S.L.W. 4239, 4242 (1987) (O'Connor, J., dissenting).

Justice O'Connor's application of *Monell* principles in *Kibbe* is especially interesting for analysis of the case sought to be brought before the bar of this Court because both cases are Fourth Amendment cases involving the use of deadly force to prevent the escape of a suspect. Justice O'Connor distrusted imposing §1983 liability where there was only a remove connection, for otherwise the distinction between "vicarious liability and liability predicated on the municipality's *own* constitutional violations" would be eviscerated. *Kibbe,* 55 U.S.L.W. at 4242. By analogy to traditional tort principles where "the law has been willing to tract more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence", *id.,* she concluded that such liability might be imposed only where there was "a reckless disregard for or deliberate indifference to the rights of persons within the city's domain". *Id.*

The principles established in *Rizzo* and in *Monell* and its progeny are equally applicable to the case at bar, and the Eighth Circuit's ruling is consistent with them. Stoll did not unreasonably seize petitioner and Stoll did not command Hilke to commit an unreasonable seizure of petitioner. Nor did Stoll act with a reckless disregard or with a deliberate indifference to the rights of anyone. Stoll may have made a mistake, and his mistake may have been the result of a failure to exercise due care, but it is not unconstitutional to be negligent. See *Baker v. McCollan,* 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.").

b. Petitioner also urges certiorari on the basis of a conflict between the circuits. As conflicts go, however, there is not much of a conflict. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972),

which petitioner cites three times, is a case recognized as rejected by the Court's opinion in *Rizzo*. See *Rizzo*, 423 U.S. at 385 n.2. (Blackmun, J., dissenting). *Ware v. Reed*, 709 F.2d 345 (5th Cir. 1983) relied upon *Byrd*. *Id.*, 709 F.2d at 353. In *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982) liability was imposed on an officer for "willfully" violating constitutional rights. *Id.* at 221. Defendant "personally participated in the [unlawful] search...and was in charge", *id.* at 224; defendant personally made an unlawful entry, *id.* at 225; and the court believed that he directed his subordinates "to interfere with the civil rights of another." *Id.* at 224. *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983) does state that an action for deprivation of civil rights can rest on negligent conduct. See *Haygood*, 718 F.2d at 1478. However, the statement is made with respect to the due process simpliciter claim, and must be regarded as overruled by *Daniels v. Williams*, 474 U.S. ____, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986); and *Davidson v. Cannon*, 474 U.S. ____, 88 L.Ed.2d 677, 683, 106 S.Ct. 608 (1986) ("the protection of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due cause by prison officials"). Insofar as the Eighth Amendment claim, *Haygood* requires more than negligence: "deliberate indifference". *Haygood*, 718 F.2d 1482-1483. In any case, the *Haygood* opinion relied upon by petitioner was vacated, 729 F.2d 613 (9th Cir. 1984), and was the subject of a new opinion published at 769 F.2d 1350 (9th Cir. en banc 1985). The new opinion found a due process simpliciter violation because the officials intentionally denied the plaintiff a hearing. *Fernandez v. Chardon*, 681 F.2d 42 (1st Dir. 1982)[1] does indeed include the dictum that §1983 liability may be grounded on negligence alone, a proposition for which it cites (erroneously) *Parratt v. Taylor*. *Fernandez*, 681 F.2d at 55. But the acutal basis for imposing liability on the supervisors

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[1] This Court granted certiorari in *Fernandez* on a statute of limitation issue on which it upheld the First Circuit. See *Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

was that the supervisors had been personally involved in policies that they knew would result in persons losing their jobs because of their political affiliation and not on the basis of the supervisors' negligence. *Id.*, 681 F.2d at 56-57. *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982) is likewise based on an erroneous interpretation of *Parratt*. *Hirst*, 676 F.2d at 1263. In any case, as a §1983 claim predicated on the negligence of jail officials it, too, is inconsistent with *Daniels* and *Davidson*.[2] Indeed, the Ninth Circuit has recently itself recognized that the *Hirst* holding was based upon "an obsolete foundation". See *Escamilla v. City of Santa Ana*, 769 F.2d 266, 270 n.1 (9th Cir. 1986). *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978), a procedural due process case, erroneously recognized the possibility of vicarious liability, 588 F.2d at 744, and was decided before *Rizzo*, *Monell*, *Daniels* and *Davidson*. More recently, the Ninth Circuit has recognized that a claim which "amounts to no more than a claim of negligence...is no longer actionable under section 1983". *Escamilla v. City of Santa Ana, op cit*, 796 F.2d at 270. *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *affirmed* the District Court's grant of a new trial on behalf of the defendants who had not actively participated in striking plaintiff; the dictum cited by petitioner is also based upon the repudiated opinion in *Byrd v. Brishke*. See *Bruner*, 684 F.2d at 425-426. *Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981) is yet another case based upon *Byrd v. Brishke;* see *Putnam*, 639 F.2d at 423; it is not based on a negligence theory; and even if it was, as a due process simpliciter case arising in a prison context, the opinion is obsolete after *Daniels* and *Davidson*. In any case, conflicts within a circuit are a disfavored basis for granting certiorari. See *Davis v. United States*, 417 U.S. 333, 340 (1974).

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[2] The opinion was not well thought of. There was a vigorous dissent, *Hirst*, 676 F.2d at 1265-1271, and the opinion was criticized in *Massey v. Smith*, 555 F.Supp. 743, 747 (N.D.Ind. 1983), in *Emory v. Duckworth*, 555 F.Supp. 985, 989-990 (N.D.Ind. 1983), and in *Rigner v. Duckworth*, 562 F.Supp. 378, 381-382 (N.D.Ind. 1983).

c. The decisions of the Court in *Rizzo* and in *Monell* and its progeny have given the courts of appeals sufficient guidance for resolution of cases involving remote liability under §1983. Not surprisingly, analysis shows that there is no contemporary conflict in the circuits on the issue. It would be improvident to grant a writ of certiorari for yet another opinion on the issue of whether negligence is sufficient to impose §1983 liability upon a remote actor.

2. The Qualified Immunity That Respondents Enjoy Provides An Independent Ground Upon Which The Judgment Of The Court Of Appeals May Be Sustained, And The Issue Is One That Should Be Ruled Upon By The Lower Courts.

Petitioner requests the Court to address the issue of whether respondents are protected by the doctrine of qualified immunity. Petitioner does not argue that the issue presents any of the considerations governing review on certiorari set forth in Supreme Court Rule 17; evidently, petitioner seeks only to preserve the issue in the event that the Court should grant the petition on the grounds put forward in support of the other questions presented. Oddly, it is considerations that pertain to the qualified immunity defense that present one of the most telling arguments why the petition should not be granted.

"[G]overnmental officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982). This is a doctrine that is applicable to police officers. *Malley v. Briggs,* 475 U.S. ____, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986). Though petitioner pretends that footnote 1 of the Court's opinion in *City of Oklahoma City v. Tuttle,* 471 U.S. ____, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) suggests that *Harlow* may have eliminated the qualified immunity defense in excessive force cases, there is nothing said in that footnote that

even hints that this is so. More to the point is footnote 4, where the Court notes that it "has never held that every instance of use of 'unreasonable force' in effecting an arrest constitutes a violation of the Fourth Amendment; nor has this Court held under circumstances such as these that there has been a deprivation of life 'without due process of law.' " *Tuttle,* 85 L.Ed.2d at 800 n.4. The Court recognized that the facts in *Tuttle* were "very similar" to the facts in *Tennessee v. Garner,* 471 U.S. ____, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), in which the officer who committed the unconstitutional deadly force seizure was acquitted on the basis of qualified immunity. The facts are also very similar to the facts in the case at bar, which is also based on a *Tennessee v. Garner* theory.

Petitioner cites several cases for the proposition that it is clearly established that the use of excessive force is unconstitutional. *Clark v. Beville,* 730 F.2d 739 (11th Cir. 1984), however, says no such thing. Rather, the court notes that "Beville [the defendant] does not dispute that it is clearly established that a police officer may not apply undue force in effecting an arrest ..." *Clark,* 730 F.2d at 740 (emphasis added). *Fernandez v. Leonard,* 784 F.2d 1209 (1st Cir. 1986), does suggest that by 1976 there was a clearly established constitutional right to be free of "excessive force", but excessive force is defined in terms of force that "is so excessive and brutal that it 'shocks the conscience.' " *Fernandez,* 784 F.2d at 1216. The opinion also suggests[3] that the right to be free from unreasonable seizures was clearly established in 1976. *Id.* 784 F.2d at 1217. Since the plain language of the Fourth Amendment forbids unreasonable seizures in those very terms, one would have thougth that such a right would have been clearly established the moment that the amendment was ratified. In any case, the immunity issue in the present case is whether it was clearly established that the use of

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[3] The opinion has been criticized for its lack of clarity. See *Justice v. Dennis,* 793 F.2d 573, 577 (4th Cir. 1986).

deadly force to apprehend nondangerous felons was unreasonable in Fourth Amendment terms at the time that petitioner was seized. The *Fernandez* court seems to grudgingly recognize that the unreasonableness of such force was not clearly established until 1985. *Id.* 784 F.2d at 1217 n.3. *Coon v. Ledbetter,* 780 F.2d 1158, 1164 (5th Cir. 1986), states that the use of excessive force does violate clearly established rights, but does not cite any authority for that proposition, and the opinion does not say that the right was clearly established in 1978, the date of the incident in the case at bar.

It was not clearly established in February of 1978 that the use of deadly force to apprehend nondangerous suspect is an unreasonable seizure. Petitioner cites the four to three opinion *Mattis v. Schnarr,* 547 F.2d 1007 (8th Cir. 1976) as settling that doctrine in the Eighth Circuit, but he fails to remind the Court that it had vacated that opinion before the incident in question! See *Ashcroft v. Mattis,* 431 U.S. 171 (1977). Indeed, the only appellate decisions that had considered the question up to the time of the incident had found such seizures to be constitutional. See *Jones v. Marshall,* 528 F.2d 132 (2nd Cir. 1975), and *Wiley v. Memphis Police Dept.,* 548 F.2d 1247 (6th Cir. 1977), cert. den. 431 U.S. 968. It was not until the Court's 1985 opinion in *Tennessee v. Garner,* op. cit., that the Court declared that the shooting of nondangerous felons was unconstitutional. The Court noted that as late as 1985 such seizures were approved in approximately one-half the states, *id.,* 85 L.Ed.2d 12-13, and that it "cannot be said that there is a constant or overwhelming trend away from the common-law rule." *Id.,* 85 L.Ed.2d at 14. Indeed, three justices dissented from the holding that such seizures were unconstitutional. It is clear that it was not clearly established in February of 1978 that the shooting of nandangerous fleeing felons was unconstitutional.

Petitioner relies upon the fact that the police commissioners who employed respondents had adopted an internal policy forbidding their employees from using deadly force in such cir-

cumstances. However, this Court held in *Davis v. Scherer,* 468 U.S. 183 (1984) that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely becauae their conduct violates some statutory or administrative regulation." *Id.,* 468 U.S. at 194. Petitioner attempts to evade this structure by resorting to the language in *Davis* "Appellee makes no claim that the appellants' violation of the state regulation either is itself actionable under §1983 or bears upon the claim of constitutional right that appellee asserts under §1983", emphasizing the last clause. *Davis v. Scherer, supra,* 468 U.S. at 193.

Petitioner completely misapprehends the meaning of that passage. In the Court's footnote to the quoted phrase it explains: "State law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth Amendment are created by state law . . ." citing *Board of Regents v. Roth,* 408 U.S. 564 (1972). *Id.,* 468 U.S. at 193 n.11. Liberty interests, too, have occasionally been held to be created by state law, although it appears that the Court has found such interests primarily in the context of prison cases. See *Hewitt v. Helms,* 459 U.S. 460 (1983). However, while the Due Process Clause gives protection to state-created liberty and property interests in its procedural aspect, the protection if affords liberty and property in its substantive aspect is very much more restricted. As Justice Powell recently pointed out: "While property interests are protected by procedural due process even thought the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth,* 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), substantive due process rights are created only by the Constitution." *Regents of University of Michigan v. Ewing,* 474 U.S. ____, 88 L.Ed.2d 523, 535, 106 S.Ct. 507 (1985) (Powell, J., concurring). The same is true of liberty interests. Substantive due process protects only liberty interests that flow from either those portions of the Bill of Rights deemed incorporated, or those whose infringement is such as to shock the conscience. See *Rochin v. California,* 342 U.S. 165 (1952), quoted in *Whitley v. Albers,*

475 U.S. ____, 89 L.Ed.2d 251, 265, 106 S.Ct. 1078 (1986). Thus, petitioner attempt to evade the strictures of *Davis* fail because any liberty interest that may have been created by the regulation is one protected only by procedural due process.[4]

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), upon which petitioner relies, demonstrates the fatal misunderstanding from which petitioner's argument suffers. *Spruytte* was a procedural due process case where the court found that plaintiff prisoner had a property interest conferred by state law of which he could be deprived only if the procedural requirements were observed. *Id.,* 753 F.2d at 506-508. Significantly, the discussion in *Spruytte* is relied upon in *Washington v. Starke,* 626 F.Supp 1149 (W.D. Mich. 1986), appeal dismissed 791 F.2d 936 (6th Cir. 1986), a case remarkably similar to the case at bar for in both cases defendant police officers used deadly force in violation of internal regulations. The Court cited *Spruytte* in its opinion granting summary judgment for the defendants on the basis that the unconstitutionality of the fleeing felon rule had not been established in 1982.

The real significance, then, of the qualified immunity issue is that it provides an important reason why certiorari should not be granted to review the other questions presented by the petition. The Court has suggested that a conflict may not be a sufficient ground to grant certiorari where the Court may decide the case on another ground and thus not reach the issue on which there purportedly is a conflict; see, e.g., *S.S. Monrosa v. Carbon Black Export,* 359 U.S. 180 (1959); and has likewise refused to decide constitutional issues where there are present nonconstitutional issues which might alone serve as an independent

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[4] If this were a procedural due process case, petitioner's case would fail under the doctrine of *Parratt v. Taylor,* 451 U.S. 527 (1981) for Missouri makes available a post-deprivation remedy for unlawful arrests.

ground for the disposition of the case. See *Alma Motor Co. v. Timken-Detroit Axle Company,* 329 U.S. 129 (1946).

This case is in just that posture. The qualified immunity issue is not a close one and it is highly likely that the Court would sustain the Eighth Circuit's opinion reversing the judgments entered against respondents on this independent ground not involving a constitutional issue or a conflict.[5] Indeed, because court below did not reach the qualified immunity issue, Pet. App. p. 10a, the posture of this petition bears a close resemblance to that presented by *Barr v. Mateo,* 355 U.S. 171 (1959), where the Court refused to review an important question and ordered the court of appeals to pass upon an alternative argument - qualified privilege - not passed upon below.

There is another closely related reason why a grant of certiorari would be improvident. Petitioner did not request that the mandate of the court of appeals be stayed. Accordingly, the mandate has issued, the judgment of the district court has been vacated, and respondent Hilke's motion for summary judgment on the basis of his qualified immunity defense is now under submission in the district court. Pronouncements by the Court that have extended over many decades disfavor granting certiorari in cases where the judgment below is not final. See, e.g. *American Construction Co. v. Jacksonville T. & K.R. Co.,* 148 U.S. 372, 384 (1893); and *Coleman v. PACCAR, Inc.,* 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.). These considerations are compelling in the circumstances presented by the instant case. Respondent's motion for summary judgment may be ruled upon while the Court is considering whether petitioner's petition is granted; certainly it will be ruled upon before the Court rules on the merits should the Court accept the case. In the

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[5] In fact, as is argued in respondent Hilke's cross-petition filed contemporaneously with the brief, the qualified immunity defense is one that would authorize relief greater relief that the appellate court afforded him: entry of judgment in his favor.

meantime, that ruling may be appealed to the court of appeals, see *Mitchell v. Forsyth,* 472 U.S. ____, 86 L.Ed.2d 411, 105 S.Ct. ____ (1985), or it may be tried, and be appealed after trial. There is little sense in expending the Court's resources in deciding the case at this stage.

3. The Court Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings In Finding Prejudicial Error In Petitioner's Closing Argument.

Petitioner claims that the Court "violated" Rule 103, Fed.R.Evid., by finding reversible error in his final argument to the jury, and accuses the court of appeals as having so far departed from the accepted and usual course of judicial procedures as to warrant this Court to exercise its power of supervision.

The court of appeals did not, of course, violate Rule 103, Fed.R.Evid. By definition, the rules of evidence govern the admission of evidence, and argument is not evidence. Technicalities notwithstanding, respondents agree that the customary rules as to final argument require objection, absent plain error, and that plain error requires prejudice. However, respondents plainly made an objection; and the objection was overruled. Pet. App. 23a. Petitioner objects to the court of appeals considering portions of his closing argument that took place just before and just after respondents' objection, but his own authorities think it proper. In *Westbrook v. General Tire & Rubber Co.,* 754 F.2d 1233, 1241 (10th Cir. 1985), the court reversed, declining to accept plaintiff's argument that defendant had objected to only one part of the argument: "We cannot look at the objected material in isolation, however. A review of the entire argument reveals that while [defendant] objected to just one community conscience statement, similar arguments pervaded [plaintiff's] argument." Likewise, in *Kehr v. Smith Barney, Upham & Harris Co.,* 736 F.2d 1283, 1286 (9th Cir. 1984), the court observed that "constant objections are certain-

ly not required, as they could antagonize the jury . . ." And so it is here. After the trial court not only overruled their objection but pronounced petitioner's argument "appropriate", respondents' were under no obligation to risk the jury's wrath when petitioner returned to the theme moments later.

Petitioner also argues that the suggestion that "the government" would pay the verdict returned against respondents was not prejudicial. One would think that it is intuitively obvious that there would be prejudice any time a jury is advised that a deep pocket impersonal corporation, public or private, would pay a judgment rendered against individuals. Indeed, on consideration, the scattering of the cases cited by petitioner do not say otherwise. *Perrin v. Anderson,* 784 F.1d 1040 (10th Cir. 1986), did nothing more than observe that, absent a claim for punitive damages, it is error to point out to the jury that the individual defendant, and not the state employer, must pay for any judgment rendered against him. *Perrin,* 784 F.2d at 1047). Significantly, the court treated the issue of indemnity by the government as equivalent to insurance. *Id. Hobson v. Wilson,* 556 F.Supp. 1157 (D.C. 1982), mod. in other respects at 737 F.2d. 1 (D.C. Cir. 1984), does no more that say that the defendants were not entitled to an instruction that the government would not pay a judgment entered against them, where there was no trace of evidence placed before the jury that the government might pay the judgment. *Hobson,* 556 F.Supp at 1189. The implication of the court's opinion - that such an instruction would be called for if such evidence had been placed before the jury - is significant because that is exactly what happened in the case below. In *Roy v. Employers Mutual Casualty Company,* 368 F.2d 902, 905 (5th Cir. 1966), the defendant was the insurance company itself.

Those who have considered the issue have concluded that jury's are more likely to return §1983 verdicts against local governments than they are to return verdicts against individual public officials. See Newman, Suing the Lawbreakers: Pro-

posals to Strengthen The Section 1983 Damage Remedy for Law Enforcers' Misconduct: 87 Yale L.J. 447 (1978); Project, Suing the Police in Federal Court, Yale L.J. 781, 800-802 (1979); and M. Avery & D. Rudovsky, Police Misconduct: Law and Litigation, §3.5(a) (2d.Ed. 1985). Thus, common sense and considered opinion agree.

In *New York Central Railroad Company v. Johnson*, 279 U.S. 310 (1929), this Court reversed a judgment where there was prejudice in closing argument, noting that "[t]he failure of the trial judge to sustain [defendant's] objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced." *Id.*, 279 U.S. at 318. And so it is here: when the district judge not only overruled respondents' objection, but pronounced petitioner's argument "appropriate", Pet. App 23a, the prejudice was enhanced. Far from departing from the accepted and usual course of judicial proceedings, the court of appeals faithfully followed this Court's example.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314 City Hall
St. Louis, MO 63103
622-3361

Attorneys for Respondents

*Counsel of Record